

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK ALDEN JOHNSON,

Defendant-Appellant.

UNPUBLISHED

March 17, 2011

No. 296222

Washtenaw Circuit Court

LC No. 08-002097-FH

Before: SHAPIRO, P.J., and HOEKSTRA and TALBOT, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of intimidation of a witness, MCL 750.122(6), (7)(c), solicitation of an unlawful imprisonment, MCL 750.157b(3); MCL 750.349b, and bribing a witness, MCL 750.122(3)(c), (7)(b). The trial court sentenced defendant to concurrent prison sentences of 5 to 15 years for the witness intimidation and bribing convictions and 3 to 5 years for the solicitation conviction. We affirm.

I. BASIC FACTS

Defendant and Willie Walker, inmates in the Washtenaw County Jail, often discussed defendant's case. According to Walker, defendant stated that he did not want his case to go any further. He told Walker that he wanted his girlfriend, Tonya Schumacher, out of the way; he wanted her kidnapped and held for three months. Walker told defendant that his cousin, Joseph Taylor, could possibly help. However, after Walker became concerned that he might be implicated in a conspiracy with defendant, as well as becoming fearful for Schumacher's safety, Walker sent out a "kite" that defendant wanted to have his girlfriend killed.

Detective Everette Robbins investigated the kite. He spoke with Walker and reviewed written correspondence between Walker and defendant. Robbins recruited Detective Tony Williams to meet with defendant while pretending to be Taylor.

Williams spoke with Walker before he met with defendant; he learned that defendant wanted him to either kill or kidnap Schumacher. According to Williams, it was clear by the end of his meeting with defendant that defendant wanted him to kidnap Schumacher and hold her for two months. Williams admitted that every time defendant referred to the job that he wanted Williams to do, defendant used the word "car." For example, defendant asked Williams how much it would cost to get the "car" back and he promised payment when Williams had the "car"

in his possession. However, Williams stated that he and defendant did not discuss him stealing a car.

Trevor Goodman also spent time in the Washtenaw County Jail. He testified that defendant asked him for help. Defendant first asked him if his wife would testify that she had gotten into an altercation with Schumacher. When Goodman said no, defendant asked him if his sister Candace would testify that she had gotten into a fight with Schumacher. Goodman agreed to write a letter to Candace. Goodman also testified that he heard defendant discussing with other inmates having Schumacher kidnapped. Goodman sent out a “kite” because he was concerned for Schumacher’s safety.

Goodman’s kite was forwarded to Robbins. Robbins asked Sergeant Marlene Radzik to meet with defendant while pretending to be Candace.

Radzik went into the meeting with defendant believing that defendant wanted his girlfriend killed. However, in speaking with defendant, it became apparent to Radzik that defendant did not want Schumacher killed or injured. Rather, defendant wanted her to tell the police that Schumacher caught her in bed with defendant and that Schumacher was injured when the two women fought. Defendant offered her money to lie in court.

Schumacher testified that defendant, before he went to jail, wrecked her car in an accident. A friend, Steve Webber, bought an Explorer, and allowed Schumacher and defendant to use it. However, after defendant was arrested, Webber took back the Explorer.

According to defendant, he wanted to steal back the Explorer for Schumacher. He asked Walker, who said that he had done some auto thefts, if Walker could find someone to help him. He spoke with Williams about Williams stealing the Explorer. His plan was for Williams to steal the Explorer and hide it, and then Schumacher would go get it. He admitted that he told Williams to hold the “car” for two months; he said it because the conversation was being recorded and he could not be blunt.

II. SUFFICIENCY OF THE EVIDENCE

Defendant claims that his convictions for intimidation of a witness and solicitation of an unlawful imprisonment are not supported by sufficient evidence because there was no evidence that he planned the murder or kidnapping of Schumacher. According to defendant, the evidence established that his only concern was stealing the Explorer for Schumacher. We disagree.

We review de novo a challenge to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *Id.* The credibility of the witnesses and the weight accorded to the evidence are questions for the jury. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). We resolve any conflicts in the evidence in the favor of the prosecution. *Id.*

Goodman testified that he overheard defendant discuss with other inmates ways to make sure that Schumacher did not appear in court. He heard defendant discuss having Schumacher

kidnapped. Walker testified that defendant told him that he wanted Schumacher kidnapped and held for three months, and defendant asked Walker if he knew of anyone who could help. After Walker told defendant that Taylor could possibly help, defendant wrote in a note to Walker that “food and water should be available,” there was to be “no raping, touching, or kissing,” and that Schumacher should be “[t]ied until they git [sic] to location” and “put somewhere ‘til after [his] court date.” In another note, defendant asked Walker if Taylor would have any problem tying and taping Schumacher’s feet and mouth. Defendant also wrote that there needed to be a Plan B. According to Walker, defendant’s Plan B was for Walker’s girlfriend to testify that she slept with defendant and Schumacher found out. In addition, Williams, pretending to be Taylor, met with defendant. While Williams admitted that defendant used the word “car” to refer to the work defendant wanted done, he testified that the two men never discussed him stealing a car. It was clear to him that defendant wanted him to kidnap Schumacher and hold her for two months; defendant told Williams that he would be out of jail in two or three months if Williams did the job for him. Defendant later told Walker that he had met with Taylor and that “everything was smoo (sic).”

The conversation between Williams and defendant had been recorded, and it was played for the jury. In addition, the jury saw the letter that defendant intended for Walker where he asked Walker about making payment for the “car.” The jury, interpreting defendant’s use of the word “car” in his conversation with Williams and in his written correspondence in light of the testimony of Goodman, Walker, and Williams, as well as the notes written between defendant and Walker, could have found beyond a reasonable doubt that defendant asked and intended Williams to kidnap Schumacher. Accordingly, defendant’s convictions for intimidation of a witness and solicitation of an unlawful imprisonment are supported by sufficient evidence.

III. GREAT WEIGHT OF THE EVIDENCE

Defendant asserts that his convictions for intimidation of a witness and solicitation of an unlawful imprisonment are against the great weight of the evidence because “the credible trial evidence” established that he only wanted the Explorer returned to Schumacher by illegal means. We disagree.

Because defendant did not raise this issue in a motion for a new trial, it is not preserved for our review. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Thus, we review it for plain error affecting defendant’s substantial rights. *Id.*

A verdict is against the great weight of the evidence if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). “Generally, a verdict may be vacated only when the evidence does not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence.” *Id.* Conflicting testimony, even if impeached, is not a sufficient ground for granting a new trial. *Musser*, 259 Mich App at 219. “[U]nless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities,” a court must defer to the jury’s credibility determination. *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998) (internal quotations and citations omitted).

The jury's verdict finding defendant guilty of witness intimidation and solicitation of an unlawful imprisonment was not against the great weight of the evidence. Defendant testified that he wanted Williams to steal the Explorer. In the conversation with Williams, he spoke of the "car," and he referenced the "car" in a subsequent letter intended for Walker. However, Williams testified that he and defendant did not discuss stealing a car. It was clear to him that defendant wanted Schumacher kidnapped and held for two months. In addition, defendant only met Williams, who was pretending to be Taylor, after defendant asked Walker if Walker knew of anyone who could kidnap Schumacher and Walker replied that Taylor could possibly help. In a written note, defendant gave instructions to Walker about kidnapping Schumacher. This evidence, along with the other evidence summarized in Part II, *supra*, supports the jury's verdict.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he received ineffective assistance of counsel when defense counsel failed to move for a directed verdict at the close of the prosecution's case. According to defendant, counsel should have moved for a directed verdict because the prosecution's evidence that he intended to murder or kidnap Schumacher was weak. We disagree.

Because the trial court did not hold a *Ginther*¹ hearing on defendant's claim, our review is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008).

A defendant "is entitled to 'a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction.'" *People v Szalma*, 487 Mich 708, 720-721; 790 NW2d 662 (2010), quoting MCR 6.419(A). "In assessing a motion for a directed verdict of acquittal, a trial court must consider the evidence presented by the prosecution to the time the motion is made and in a light most favorable to the prosecution, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003).

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Here, a motion for a directed verdict would have been futile. As discussed in Part II, *supra*, the evidence presented in the prosecution's case-in-chief, when viewed in the light most favorable to the prosecution, was sufficient for a rational trier of fact to find that defendant asked and intended Williams to kidnap Schumacher. Counsel was not ineffective for failing to make a futile motion. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant also claims that counsel was ineffective for failing to voir dire Walker to determine the authenticity of defendant's handwriting in notes passed between Walker and defendant and for failing to voir dire Robbins to determine he was able to authentic defendant's voice in a recorded telephone call. This claim of ineffective assistance of counsel is not properly presented for our review because it was not included in defendant's statement of questions presented. *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). Moreover, because defendant fails to support this ineffective assistance claim with any citation to legal authority, he has abandoned the claim. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Regardless, we find no merit to the claim. "The requirement of authentication . . . is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(a). An object may be authenticated by "[t]estimony that a matter is what it is claimed to be." MRE 901(b)(1). A writing may be authenticated by "[n]onexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation." MRE 901(b)(2). Similarly, a voice may be authenticated, "whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." MRE 901(b)(6). The evidence established that Walker was familiar with defendant's handwriting. Walker testified that, after he and defendant became concerned about other inmates hearing their conversations about kidnapping Schumacher, the two men began to write notes to each other. They would pass the notes to each other under their jail cell doors. In addition, Walker testified that he actually saw defendant write one of the notes. The evidence also established that Robbins was familiar with defendant's voice. Robbins testified that he monitored Williams's and Radzik's meetings with defendant over the Abercom system. Robbins also listened to many of defendant's telephone calls. Accordingly, defense counsel was not ineffective for failing to conduct additional voir dire of Walker or Robbins.

V. GINTHER HEARING

Defendant also claims that the trial court erred in denying his request for a *Ginther* hearing. We disagree.

We review a trial court's decision whether to hold an evidentiary hearing for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id.* at 217.

The purpose of a *Ginther* hearing is to establish facts that assist the defendant in making his ineffective assistance of counsel claims. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973). Defendant moved for a *Ginther* hearing on claims that counsel was

ineffective for failing to move for a directed verdict and for failing to conduct further voir dire of Walker and Robbins to establish their ability to authenticate defendant's handwriting and voice. Defendant fails to articulate any facts that need to be established to further his ineffective assistance claims. *People v McMillan*, 213 Mich App 134, 142; 539 NW2d 553 (1995). Indeed, both of defendant's ineffective assistance claims can be decided on the existing record. See Part IV, *supra*. The trial court did not abuse its discretion in denying defendant's motion for a *Ginther* hearing.

VI. OV 19

Defendant argues that the trial court erred in scoring 15 points for offense variable (OV) 19, MCL 777.49. According to defendant, OV 19 must be scored at zero points because the evidence established that he wanted the Explorer returned to Schumacher. We disagree.

We review "a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). A scoring decision for which there is any evidence in support will be upheld. *People v Phelps*, 288 Mich App 123, 135; 791 NW2d 732 (2010).

Fifteen points may be scored for OV 19 if "[t]he offender used force or the threat of force against another person . . . to interfere with, attempt to interfere with, or that results in the interference with the administration of justice" MCL 777.49(b). OV 19 is to be scored at zero points if "[t]he offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice" MCL 777.49(d). Contrary to defendant's assertion that he was only concerned with returning the Explorer to Schumacher, there was, as recounted in Part II, *supra*, evidence in the record that defendant asked and intended Williams to kidnap Schumacher and hold her for two months. Defendant does not argue that a plan to kidnap a witness does not constitute the attempted interference with the administration of justice. The trial court did not abuse its discretion in scoring 15 points for OV 19.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Joel P. Hoekstra
/s/ Michael J. Talbot